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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TERESA RODEN-DELGADO, Defendant and Appellant.	G038963 (Super. Ct. No. 07WF0243) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard Pacheco, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Teresa Roden-Delgado challenges the trial court's decision to revoke her participation in the drug diversion program. (Pen. Code, §§ 1000 et seq.) She contends her revocation hearing was procedurally and substantively flawed, but we disagree and affirm the judgment.

FACTS

In January 2007, appellant was charged with possessing drug paraphernalia, methamphetamine and a nonprescribed controlled substance. She was also accused of being under the influence of methamphetamine. After she pleaded guilty to the charges, the court deferred entry of judgment and placed her in the drug diversion program. As part of that program, the court ordered appellant to enroll in a drug treatment program. The court warned her that if she was ever discharged from her drug treatment program, she could be sentenced up to three years in prison. Appellant said she understood this.

On February 27, 2007, appellant enrolled in a drug treatment program with a counseling service in Costa Mesa. Six weeks later, on April 14, the court received a letter from the service stating appellant had been discharged from the program for "continued drug use." Although the letter makes reference to an attached lab report, no report was attached to the letter. Based on the letter, the court set a hearing to determine whether appellant should be terminated from the drug diversion program.

On May 7, 2007, the court took up arguments regarding the burden of proof at the hearing. Defense counsel argued the burden should be on the prosecution to prove appellant was no longer qualified for the drug diversion program. She also claimed the discharge letter was insufficient to meet the burden of proof because it was unreliable hearsay. In response, the prosecutor invited the court to take judicial notice of the letter and argued unless appellant could show the letter was inaccurate, or she was otherwise suitable for treatment, the court would have to terminate her from the diversion program. In its tentative opinion on the matter, the court indicated it was inclined to agree with the prosecutor.

A week later, when the revocation hearing commenced, the court took judicial notice of the discharge letter. More discussion on the burden of proof followed, and then the prosecutor asked the judge if he had the lab report that was referenced in the letter. The judge said he did not, and without it, he could not "make a ruling one way or the other." It also became apparent that defense counsel did not have a copy of the lab report. So, the prosecutor supplied copies to the court and opposing counsel, and the court took a recess to allow everyone to review the report.

Dated March 22, 2007, the report is a one-page document from the Redwood Toxicology Laboratory in Santa Rosa. It indicates a specimen was collected from appellant on March 16 and received on March 21. It also states the specimen tested positive for "Amphetamines [¶] Confirmed as Methamphetamine and Amphetamine by TLC." Typed at the bottom of the report is the representation that "[t]he results for this specimen have been tested in accordance with all Redwood Toxicology Laboratory standard operating procedures and have been reviewed by laboratory certifying scientists. [¶] Chief Toxicologist: Wayne Ross, M.C.L.S."

Defense counsel was not impressed with the report. When the revocation hearing reconvened, she argued that both the report and the discharge letter "are hearsay documents. They are not self-authenticating; they are not under penalty of perjury; they haven't been shown to be business records . . . . [¶] There are several names . . . on the [lab report]. It's not clear who prepared the analysis. We believe that these two documents are insufficient to shift the burden to the defendant to show anything really." With that, the defense submitted without presenting any evidence on appellant's behalf.

The prosecutor argued the lab report was sufficiently reliable to prove appellant had used methamphetamine. He also claimed that in the absence of any evidence by the defense, the report was sufficient to terminate appellant from the diversion program. The court agreed. Based on the lab report, it found appellant was performing unsatisfactorily in her drug treatment program and terminated her from

diversion. It then entered judgment, sentencing appellant to three years' formal probation.

I

Appellant contends the court erred in "placing the burden of producing evidence" on her. The implication is that the court required her to shoulder the burden of proof at the revocation hearing, but that is not what the record reflects. Accordingly, we reject her contention.

Penal Code sections "1000 to 1000.4, enacted in 1972, authorize the courts to 'divert' from the normal criminal process persons who are formally charged with first-time possession of drugs, have not yet gone to trial, and are found to be suitable for treatment and rehabilitation at the local level." (*People v. Superior Court (On Tai Ho)* (1974) 11 Cal.3d 59, 61.) "If the defendant is found suitable, pleads guilty to the charges, and waives time for trial, entry of judgment is deferred for the duration of the program. [Citations.]" (*People v. Popular* (2006) 146 Cal.App.4th 479, 483.)

However, "[i]f it appears . . . the defendant is performing unsatisfactorily in the assigned program, . . . the prosecuting attorney, the court on its own, or the probation department may make a motion for entry of judgment. [¶] After notice to the defendant, the court shall hold a hearing to determine whether judgment should be entered. [¶] If the court finds that the defendant is not performing satisfactorily in the assigned program, . . . the court shall render a finding of guilt to the charge or charges pled, enter judgment, and schedule a sentencing hearing . . . ." (Pen. Code, § 1000.3.)

Although the statutory scheme is silent as to who has the burden of proof at a revocation hearing, that burden logically falls to the prosecution because, unless it is shown that the defendant is performing unsatisfactorily in her assigned program, the court may not enter judgment against her. (See generally Evid. Code, § 550, subd. (a) [burden of producing evidence as to a particular fact is on the party against whom a

finding would be required in the absence of further evidence].) The question is, did the court wrongly saddle appellant with the burden of proof at her revocation hearing?

We think not. The only time the court looked to appellant for anything was *after* it had been presented with evidence that she had been discharged from her drug treatment program for continued drug use. Whether or not the evidence of her drug use was legally sufficient to justify her termination from the drug diversion program is a question we address below. However, it is clear from the record that the court viewed the discharge letter and lab report as prima facie evidence of appellant's noncompliance with her drug plan, and that without this evidence, it would not have terminated her from the diversion program. Calling on the defense to rebut this evidence was not improper because by then, the initial burden of production had already been met *by the prosecution*. There was no misallocation of the burden of proof.

II

Appellant also argues the court erred in admitting the lab report into evidence. We disagree.

Appellant first assails the court for taking judicial notice of the lab report, but the court took judicial notice of the discharge letter, not the lab report. Therefore, appellant's initial claim misses the mark.

However, she also contends the report was admitted in violation of her confrontation rights. This contention merits further discussion. Because diversion has been described as a "specialized form" of probation (*People v. Superior Court (On Tai Ho), supra,* 11 Cal.3d at p. 66) and as having "many similarities" to probation (*People v. Mazurette* (2001) 24 Cal.4th 789, 796), we will look to probation revocation cases in forming our analysis.

Appellant concedes the Sixth Amendment right of confrontation does not apply to probation revocation proceedings. (See *Morrissey v. Brewer* (1972) 408 U.S. 471, 480; *People v. Winson* (1981) 29 Cal.3d 711, 716.) But, as she rightly notes, such

proceedings must still comport with due process, which encompasses a "limited right to confront witnesses." (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411.) That right protects probationers against the admission of *testimonial* hearsay, unless the court finds good cause to dispense with cross-examination. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1159; *People v. Shepherd* (2007) 151 Cal.App.4th 1193.)

Here, however, the prosecution relied not on testimonial hearsay, but *documentary* hearsay in the form of the lab report. Consequently, it was not required to show good cause why the maker of the report was not available for cross-examination. (*People v. Maki* (1985) 39 Cal.3d 707, 715.) Instead, it was merely required to show the lab report bore "sufficient indicia of reliability" to justify its admission into evidence. (*Id*. at p. 709; see also *People v. Arreola, supra*, 7 Cal.4th at p. 1156.)

This is a "more lenient" standard than the good-cause standard applicable to testimonial hearsay. (*People v. Shepherd, supra*, 151 Cal.App.4th at p. 1201.) And the reason is simple: While "the need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor[,] . . . the witness's demeanor [generally] is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as *laboratory reports*, invoices, or receipts . . . ." (*People v. Arreola*, *supra*, 7 Cal.4th at pp. 1156-1157, fn. omitted, italics added; see also *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 783, fn. 5 [sanctioning the use of documentary hearsay evidence in probation revocation proceedings].)

In *People v. Johnson, supra*, 121 Cal.App.4th 1409, the court recognized as much in upholding the admissibility of a drug lab report that was used to revoke Johnson's probation. Describing the report as "routine documentary evidence," the court determined it bore sufficient indicia of reliability because it "was identified by case number and by Johnson's name, and came from the crime laboratory that routinely tested narcotics for the" police. (*Id*. at p. 1411, fn. 1.) The court also relied on the fact that

"defense counsel made no claim the report was untrustworthy in any specific way." (*Ibid*.)

The lab report at issue here contains appellant's name and was ordered by the counseling service that administered her drug program. There is no question appellant is the subject of the report. Admittedly, the evidence did not indicate whether drug reports from the Redwood Toxicology Laboratory are regularly used in judicial proceedings. However, the subject report states that the results shown therein were produced in accordance with the lab's "standard operating procedures and have been reviewed by laboratory certifying scientists." The report also states that the finding at issue here — that appellant's specimen tested positive for methamphetamine — was individually confirmed, albeit by a person who is identified only by his initials, TLC. And, defense counsel failed to show the report was unreliable in any specific way.

For all these reasons, we conclude the report is sufficiently reliable to comport with the dictates of due process. Not only is the report similar to the one relied on in *People v. Johnson, supra*, it is comparable to other types of documentary hearsay that have been lawfully used in revocation proceedings. (See *People v. Maki*, *supra*, 39 Cal.3d at p. 717 [car rental invoice and hotel receipt]; *People v. Abrams* (2007) 158 Cal.App.4th 396 [information contained in probation report and probation department's computer records]; *People v. O'Connell* (2003) 107 Cal.App.4th 1062 [report from defendant's drug counseling service]; *People v. Brown* (1989) 215 Cal.App.3d 452 [drug test results]; *United States v. Bell* (8th Cir. 1986) 785 F.2d 640 [same]; *United States v. Penn* (11th Cir. 1983) 721 F.2d 762 [same].) And, as we said, "defense counsel made no claim the report was untrustworthy in any specific way."

Appellant also contends the report was barred by the United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36. *Crawford* held the Sixth Amendment prohibits the introduction of testimonial hearsay in criminal trials, unless the declarant is unavailable at trial and the defendant had a prior opportunity

to cross-examine him. (*Id*. at p. 59.) However, as noted above, a probationer's right to confront witnesses stems not from the Sixth Amendment's confrontation clause, but the due process clause of the Fourteenth Amendment. (See *People v. Johnson, supra*, 121 Cal.App.4th at p. 1411.) "Thus, *Crawford's* interpretation of the Sixth Amendment does not govern probation revocation proceedings. [Citation.]" (*Ibid*.; accord *People v. Abrahms, supra*, 158 Cal.App.4th at p. 400, fn. 1.)

Moreover, for purposes of the *Crawford* rule, testimonial evidence is limited to statements that, among other things, "describe[] a *past* fact related to criminal activity . . . ." (*People v. Geier* (2007) 41 Cal.4th 555, 605, italics added.) Lab reports typically do not meet this requirement because they "involve the *contemporaneous* recordation of observable events." (*Id*. at p. 606, italics added [report of DNA test results was not testimonial under *Crawford*].) Therefore, even if *Crawford* applied to revocation hearings, it would be of no help to appellant in this case. She has failed to show the court erred in considering the lab report at her revocation hearing.

III

Next, appellant claims the court failed to exercise its discretion because it did not expressly consider all of the pertinent factual and legal considerations in making its decision. She also claims the court abused its discretion by terminating her from diversion without giving her a second chance in the program. Neither claim has merit.

The premise of appellant's claim is that the Legislature did not intend for courts to terminate defendants from diversion based on a single lapse in treatment. In support of this premise, appellant relies on Penal Code section 1000.5, which calls for "a regimen of graduated sanctions and rewards" in the establishment of "preguilty plea" drug programs. (Pen. Code, § 1000.5, subd. (a).) However, appellant entered the diversion program *after* pleading guilty to the charges against her, so that section is not controlling. As appellant concedes, and our own research confirms, there is no direct

authority requiring trial court's to give defendants a "second chance" at diversion after they have suffered a relapse during treatment.

That said, we fully recognize that rehabilitation is one of the primary goals of the drug diversion program. As one court has explained, "[D]iversion permits the courts to identify the experimental or tentative user before he becomes deeply involved with drugs, to show him the error of his ways by prompt exposure to educational and counseling programs in his own community, and to restore him to productive citizenship without the lasting stigma of a criminal conviction." (*People v. Barrajas* (1998) 62 Cal.App.4th 926, 930; see also *People v. Popular*, *supra*, 146 Cal.App.4th at p. 486 [diversion program is remedial in nature].) But the diversion statute is clear: "If the court finds that the defendant is not performing satisfactorily in the assigned program, . . . the court *shall* render a finding of guilt to the . . . charges pled [and] enter judgment . . . ." (Pen. Code, § 1000.3.)

Appellant lists a number of factors the court could consider in deciding whether the defendant has performed satisfactorily in the assigned program, such as the reason for the alleged lapse and whether it was willful. However, contrary to appellant's position, the court is not *required* to expressly consider these factors in making its decision. Express findings are particularly unwarranted when, as here, the prosecution's case consists solely of documentary evidence and the defense fails to present any evidence the defendant is actually deserving of continued participation in the diversion program. Therefore, we decline appellant's invitation to equate the court's failure to make express findings with a failure to exercise its discretion. We also reject appellant's claim the court abused its discretion in terminating her from the drug diversion program. Because the evidence demonstrated appellant continued to use drugs after being placed in the program, the trial court's decision was fully justified under the law.

IV

Lastly, appellant contends she was denied her right to procedural due process, in that she was not afforded proper notice of the charges and an adequate hearing in which to defend them. We find no violation of appellant's due process rights.

"Due process is a flexible concept that calls for '"such procedural protections as the particular situation demands."' [Citation.]" (*People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1399.) In the context of probation revocation proceedings, due process is satisfied so long as the defendant is provided with notice of the alleged violation and a fair opportunity to prepare and defend against it. (*Morrissey v. Brewer, supra*, 408 U.S. 471; *People v. Vickers* (1972) 8 Cal.3d 451, 458.)

That standard was met here. As soon as appellant pleaded guilty to the charges and was placed in diversion, the court warned her that if she was ever discharged from her drug treatment program, it would impose judgment against her. Asked if she understood this, appellant answered yes. So it was clear from the outset that appellant would face consequences if she did not finish her drug program, and it was clear how serious those consequences could be.

However, less than a month after she enrolled in her drug treatment program, she was discharged from the program for continuing to use drugs. The discharge letter was filed with the court, and during a hearing at which appellant appeared, the court scheduled a hearing to determine whether she should be terminated from the diversion program. There could be no mistake that the basis for the hearing was appellant's alleged drug use, as reflected in the discharge letter.[1]

At the start of the revocation hearing, defense counsel was provided with a copy of the lab report which showed appellant's positive drug test. Because defense counsel had not seen the report, the court took a recess so she could review it. When the

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[1] The record does not reveal whether appellant personally received a copy of this letter, but it was addressed to her and discussed extensively in her presence. She makes no claim that she was unaware of it.

court reconvened, defense counsel did not allege lack of notice, nor did she seek a continuance to allow her additional time to review the report. She did challenge the report on hearsay grounds, but as we have explained above, the report bore sufficient indicia of reliability to support its admission at the hearing. At no time did appellant exercise her right to call witnesses or testify on her own behalf. Obviously, that's not because she didn't know the basis for the allegation that was being leveled against her. It was clear all along she was suspected of doing the very thing that got her into trouble in the first place, i.e., using methamphetamine. Therefore, notice was not an issue.

Appellant also complains the court failed to provide a statement of reasons for its decision or specify what evidence it relied upon in deciding to terminate her from diversion. Yet, throughout her brief, appellant repeatedly alludes to the fact that the court terminated her from diversion *based upon the lab report*. That could not have been more evident from the revocation hearing, at which the court said, "I do have a positive test from Redwood Toxicology Laboratory; therefore, I'm going to find [appellant] is unsatisfactorily performing [in the diversion program and] enter judgment." And although appellant suggests the court should have made some preliminary factual findings with respect to whether she was properly terminated from her drug treatment program, she concedes the ultimate issue was whether she deserved to be dropped from the drug diversion program. In answering that question in the affirmative, the court afforded appellant all of the procedural and substantive protections to which she was legally due. Therefore, we have no occasion to disturb the court's ruling.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O’LEARY, J.

FYBEL, J.